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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE,

Plaintiff and Respondent,

v.

DALE EDWIN THOMAS,

Defendant and Appellant.

C039567

(Super. Ct. No.
SF00-205)

Defendant Dale Edwin Thomas appeals following a plea of no contest to one count of willfully inflicting cruel and inhuman corporal punishment on a child resulting in a traumatic condition. Defendant contends the court erroneously denied his *Marsden*¹ motion to have substitute counsel appointed for the purpose of making a motion to withdraw the plea. We shall affirm because the court did not abuse its discretion in denying defendant's motion.

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

FACTS AND PROCEEDINGS

By information filed August 25, 2000, defendant was charged with one count of willfully causing a child to suffer unjustifiable physical pain or mental suffering (Pen. Code, § 273a, subd. (a)) (count I), and one count of willfully inflicting upon a child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition (Pen. Code, § 273d, subd. (a)) (count II). It was further alleged that defendant had suffered a prior serious felony conviction.

On August 28, 2000, defendant pled not guilty.

On May 8, 2001, defendant withdrew his not guilty plea and entered a plea of no contest to count II, in exchange for a dismissal of count I and the prior serious felony conviction allegation. It was also agreed, as a condition of the plea, that defendant would terminate his parental rights as to the minor victim.

Defendant's plea was premised on the evidence adduced at the preliminary hearing, consisting principally of the testimony of Donald Clark, a deputy sheriff with the Nevada County Sheriff's Department. Clark went to defendant's residence based on reports that defendant was abusing his 11-year-old son, whom Clark interviewed. According to the incident report prepared by Clark, the victim's room was unlit and smelled of urine, vomit and possibly feces. The victim, who appeared grossly malnourished, cowered in a corner when Clark entered the room. Clark discovered substantial bruises on the victim's head, arms, and back. The victim informed Clark that defendant punished him

by whipping him with a stick or belt seven or more times, but sometimes "'a lot more.'" Defendant would also make the victim stand in the corner for hours on end. The victim explained that the bruises on his forehead occurred when defendant slammed his head into the wall while he was standing in the corner.

At the change of plea hearing, the court inquired into defendant's mental condition:

"THE COURT: [Defendant], as you sit here today, are you suffering from any kind of mental illness or disease that would affect your ability to know and understand what's occurring here today?

"THE DEFENDANT: That's kind of a tough call.

"THE COURT: I understand you suffer from MS. But is it your position that the degree of your illness is such that you cannot understand what's happening here today?

"THE DEFENDANT: Most of the time I can understand. Today . . . I'm pretty sure I can understand. My short term memory has pretty much been destroyed. And it depending on -- the only consistency is that there isn't any.

"THE COURT: Well, so would it then help if we deferred this and put it to another date that you would feel better about going here?

"THE DEFENDANT: I can honestly -- the last couple days I've been feeling an attack coming on. There's no telling how long it will last. Right now my faculties are decent enough to deal with something like this. But in the future I don't know what would happen."

The court decided to proceed with the change of plea hearing. Defendant stated that he had discussed possible defenses to the charges as well the plea agreement with his attorney, Sharon Lapin, and that he needed no further time to discuss these matters. Thereafter defendant changed his plea to no contest to count II, which the court accepted.²

The sentencing hearing took place on August 13, 2001. The parties informed the court that defendant was unsuccessful in his attempt to have his parental rights terminated by the juvenile court, apparently because the victim was found not to be adoptable. The People, however, were content to waive this provision of the plea bargain agreement because, as a practical matter, defendant would have no further contact with the victim.³

The court suspended imposition of sentence and placed defendant on supervised probation for five years, on condition he serve one year in jail. When the court asked defendant if he

² As part of the change of plea proceeding, defendant also completed a change of plea form and initialed the following statement: "That I am now and was at the time this form was prepared in possession of all my faculties and have not consumed any drug, narcotic or alcoholic beverage in the 24-hour period preceding the entry of this plea to the extent that my judgment is impaired."

³ At the sentencing hearing, the prosecutor stated: "What the court has done in the juvenile proceeding is gone as far as it can go in terminating any rights that [defendant] might have in regards to the minor child in this event. We think that for the intents and purposes of the plea and the understanding that we had with the court at the time the plea was taken that that fulfills that part of it. Because [defendant] is not going to have any further contact with that minor."

understood the terms and conditions of probation, the following colloquy occurred:

"THE DEFENDANT: I do. But I have a little bit of a problem with something. I discussed with Ms. Lapin prior to the last three court appearances that I wanted to withdraw the plea.

"THE COURT: You what? Does he want to withdraw his plea?

"MS. LAPIN: We'll we've had some discussions about that, Your Honor, and I've tried to explain to [defendant]. But, apparently, from what he'd [*sic*] indicating to me today, he does wish to withdraw his plea."

The court replied that defendant would "need to file a motion . . . to address this in detail."

On August 24, 2001, defense counsel filed a written motion to withdraw the plea because the defendant's parental rights had not been terminated, which was one of the conditions of the plea bargain.

The People opposed the motion because defendant had not demonstrated good cause for withdrawal of the plea. In the People's view, the unfulfilled condition was intended to benefit the People rather than defendant, who had no right to insist on its enforcement.

At the hearing on the motion to withdraw the plea, defense counsel did not argue that the motion should be granted based on the points raised in the written motion. Instead, she suggested that defendant had not been competent to make a knowing and intelligent plea. She stated: "I have discussed this with my client. And just for the record, he's in an extremely depressed

state of mind at this point in time. Some recent events have occurred in his life such that he found himself hospitalized two days ago on a potential suicide attempt here. And so he's [sic] very depressed state of mind right now. [¶] And he has -- we've talked at length about his MS condition and how it affects his ability to process information and to recall. And it's his position in addition to what I have filed in the motion that throughout this process he's had -- his condition has deteriorated, and it has affected his ability to absorb information than what he is presented at the moment. His thought process is much slower than someone who is not afflicted with MS. And so after we've been to court and he's had a chance to think about it to the extent that he can recall, his memory is not what it could have been or should have been in court."

The court interrupted: "Let's stop and talk about that. Are you now claiming that your client was not competent to enter the plea? Is that your position?"

Counsel responded: "Yes, to a certain extent." She added: "I don't think we could pinpoint exactly at any one time during the course of these proceedings. This case has gone on for quite some time. But given my most recent discussions with [defendant] about the situation -- and I'm not a medical professional, but I'm beginning to be concerned as to how well he has been able to fully comprehend and process the plea that he took as well as what led up to it at that point in time in this case."

The court stated that it was "not going to address the question of whether or not he presently does not have the mental capacity." The court did decide, however, that defendant had the requisite mental capacity when he changed his plea and at sentencing; accordingly, it denied the motion to withdraw the plea. The court stated: "He had the mental capacity at the time of his entry of plea. And he also had the mental capacity at the time the court entered judgment in August of this year. There was no indication to the court that he did not have the mental capacity at that time. . . . [¶] So, therefore, I don't see a valid basis for [defendant's] attempt to withdraw his plea at this point in time. His plea was entered into after an extensive examination by the court. I was satisfied at that time and also at the time of sentencing in this matter that he knew and understand [sic] and agreed to what was occurring."

On September 17, 2001, defendant filed a motion in propria persona requesting additional time to file a motion for reconsideration and to appoint substitute counsel to represent him. The points and authorities accompanying the motion stated: "A defendant represented by appointed counsel may request that the court substitute new counsel if the defendant's right to counsel would be substantially impaired by continuing with the original attorney. People v. Marsden (1970) 2 Cal.3d 118. [¶] New counsel should be appointed if counsel being challenged is not providing adequate representation or if defendant and counsel have such an irreconcilable conflict that ineffective representation is likely to result. People v. Smith (1993) 6

Cal.4th 684. [¶] The standard is the same whether the motion is made before or after a conviction. People v. Smith, supra.

[¶] In this case defendant's counsel has failed to provide representation. Counsel has failed to investigate the case. Counsel refused to interview numerous witnesses, and the defendant's medical conditions. All of which would have provided exculpatory and positive defense information. Further[,] by failing to become informed of defendant's medical condition, counsel did not understand defendant's limitations on understanding the proceedings at the time. [¶] In fact, defendant suffers from multiple sclerosis. This condition affects his mental abilities and his ability to communicate. He is easily confused, has short-term memory problems and related symptoms. All of which reflects on his ability to knowing [sic] and intelligently enter into a plea. More significantly, counsel's failures denied possible defenses. [¶] Therefore, counsel [sic] needs the assistance of an attorney to assist in presenting the allegations to obtain different appointed counsel and to move to withdraw the plea."

The court denied the motion by a written order, which states in part: "This case has been adjudicated at the trial level. A *Marsden* hearing would not result in an enforceable order since Ms. Lapin is no longer the defendant's attorney, the case having gone to judgment on August 13, 2001. The court did direct Ms. Lapin to prepare a motion to withdraw plea. She did so. The court denied the motion. Had the court granted the motion, the defendant would have been returned to the status

pending before the date he entered his plea. However, in denying the motion the finality of the case at the trial level had been determined thereby relieving Ms. Lapin as defendant's attorney as a matter of law.

"This case is unlike *People v. Smith* (1993) 6 Cal.4th 684. In *Smith* the defendant sought a *Marsden* hearing after conviction but before judgment. In our case, the defendant seeks a *Marsden* hearing after judgment.

"The defendant's request for a *Marsden* hearing is denied.

"The defendant's request to reconsider his motion to withdraw his plea is likewise denied without prejudice. The defendant is aware of course that Penal Code Section 1018 provides a window of six months from the date of judgment to move to withdraw his plea when probation has been granted. In the event defendant wants to continue to pursue a motion to withdraw his plea on grounds not previously asserted, he may do so. In the process he is entitled to ask the court to appoint an attorney to represent him."

In response to this ruling, defendant chose not to file a motion; he appealed instead. Defendant filed in superior court a request for certificate of probable cause based on the same grounds set forth in his motion for appointment of substitute counsel. The court denied the request.⁴

⁴ The People have not moved to dismiss the appeal despite the absence of a certificate of probable cause. Penal Code section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo

DISCUSSION

Defendant contends that "[t]he trial court's denial of [defendant's] motion for appointment of new counsel to represent him on a motion to withdraw his plea based on his physical and mental infirmities must be reversed due to the trial court's

contendre, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

Defendant was convicted following a guilty plea; he requested a certificate of probable cause; and the superior court rejected the request.

California Rules of Court, rule 31(d) provides that a certificate of probable cause is not needed if the guilty plea appeal is based solely upon grounds "occurring after entry of the plea which do not challenge its validity" In the present case, defendant challenges the court's denial of his motion for appointment of substitute counsel. The court's ruling occurred after entry of the plea. It is not so clear that the appeal does not challenge the validity of the plea, however, since the purpose of the request for substitute counsel was to bring a motion to withdraw the plea.

"In determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: 'the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.'" (*People v. Panizzon* (1996) 13 Cal.4th 68, 76, quoting *People v. Ribero* (1971) 4 Cal.3d 55, 63.)

It is arguable that application of these rules to the present case would require defendant to obtain a certificate of probable cause to proceed with his appeal. The issue, however, is a close one, and in the absence of an objection by the People, we have proceeded to the merits.

failure to follow the procedures outlined in *People v. Garcia* (1991) 227 Cal.App.3d 1369."

People v. Garcia, supra, involved a defendant's request for appointment of substitute counsel to prepare a motion to withdraw his plea based on ineffective assistance of existing counsel. The *Garcia* court recommended the following procedure be utilized to assess the defendant's request: "The trial court should first elicit and consider the defendant's reasons for believing he has been ineffectively represented, making such inquiries of the defendant and trial counsel as appear necessary in open court or, if the trial court deems necessary, at an in camera hearing. If the defendant 'presents a colorable claim that he was ineffectively represented,' the trial court should appoint new counsel 'to fully investigate and present the motion.' A defendant presents a colorable claim when he 'credibly establishes to the satisfaction of the court the possibility that trial counsel failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel's failings.' If the defendant does not present a colorable claim, the court may deny the motion without providing for new counsel." (*People v. Garcia, supra*, 227 Cal.App.3d at p. 1377, citations and fn. omitted.)

In the present case, the court did not, in response to defendant's written motion, convene a hearing in order to develop more fully his asserted reasons for dissatisfaction with defense counsel. A court does not necessarily err, however, by

refusing to hold a hearing. *Marsden* states that "a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, *despite a defendant's offer to relate specific instances of misconduct*, abuses the exercise of his discretion to determine the competency of the attorney." (*People v. Marsden, supra*, 2 Cal.3d at p. 124, italics added.) A corollary of this rule is that a hearing is not required where the trial court is aware of the grounds for the request by some other means and is satisfied that substitution of counsel is not necessary. (*People v. Freeman* (1994) 8 Cal.4th 450, 481 [grounds set forth in habeas corpus petition]; *People v. Wharton* (1991) 53 Cal.3d 522, 580-581 [grounds contained in letter to court]; *People v. Avalos* (1984) 37 Cal.3d 216, 231 [grounds contained in handwritten motion]; *People v. Terrill* (1979) 98 Cal.App.3d 291, 298-299 [grounds stated in letter].)

In the present case, defendant's motion requesting appointment of substitute counsel to bring a motion to withdraw his plea was premised on existing counsel's alleged failure to interview "numerous witnesses" and to become familiar with defendant's medical condition, "which reflects on his ability to knowing [*sic*] and intelligently enter into a plea."

On appeal, defendant does not argue that the court should have inquired further regarding potential witnesses or possible defenses; his claim is limited to whether the court should have inquired further regarding defendant's "physical and mental infirmities."

One of the difficulties with this claim is that defense counsel already had informed the court of her doubts concerning defendant's competency to enter a knowing and intelligent plea, and on that basis she requested that defendant be permitted to withdraw his plea. The court denied the request on the merits.⁵

Following denial of that request, defendant sought appointment of substitute counsel to present another motion on the same ground. His written request, however, gave no indication how substitute counsel would provide any new information to the court. Defendant's request for substitute counsel also neglected to request a hearing to elaborate on his concerns.

In sum, the issue of defendant's alleged incompetence to enter a plea had been presented to and rejected by the court. When defendant filed his motion for appointment of substitute counsel, the court already was familiar with the issue, as well as defense counsel's alleged incompetence. Despite the absence of a request for a hearing, the court indicated that defendant could make an additional request for appointment of counsel to raise new grounds for withdrawal of his plea. In these

⁵ In making this ruling, the court recalled the circumstances surrounding the plea and the court's belief that defendant was competent to enter a plea. Defendant claims that the transcript of the change of plea hearing shows that the court's recollection was inaccurate. On the contrary, the change of plea hearing transcript reveals that defendant stated he felt competent to enter a plea despite his mental and physical difficulties.

circumstances, we fail to perceive an abuse of discretion.
(*People v. Berryman* (1993) 6 Cal.4th 1048, 1070 [granting or denying of a *Marsden* motion reviewed for abuse of discretion], overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800.)

DISPOSITION

The order denying defendant's motion for appointment of substitute counsel is affirmed.

_____, NICHOLSON, Acting P.J.

We concur:

_____, RAYE, J.

_____, HULL, J.